No. 87-5565

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

CHERLYN CLARK,

*Petitioner,*

—v.—

GENE JETER,

*Respondent.*

ON WRIT OF *CERTIORARI* TO THE SUPERIOR COURT OF PENNSYLVANIA

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether foreclosing a non-marital child's continuing right to paternal support after six years violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether a six-year statute of limitations for actions brought exclusively by the mother or guardian to establish paternity of a non-marital child for purposes of support violates the Equal Protection Clause to the Fourteenth Amendment of the United States Constitution.

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## INTEREST OF AMICI[1/]

The American Civil Liberties Union Foundation (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving and defending the civil liberties and civil rights guaranteed by law. The ACLU of Pennsylvania is one of its state affiliates.

The ACLU has participated in many of the leading decisions in which this Court has defined and protected the constitutional rights of children. This case directly involves the rights of non-marital children to the guarantees of due process and equal protection that are embodied in

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1/ The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 36.2.

the Fourteenth Amendment to the United States Constitution. The values at stake in this case therefore lie at the core of the ACLU's institutional interest.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges the constitutionality of a Pennsylvania statute that limits to six years the period in which a mother or guardian may establish paternity of a non-marital child for purposes of support from the biological father. The statute affords the child no separate or independent opportunity to establish paternity; if the mother allows the period to lapse, the child forfeits all paternal support during the remainder of his or her minority. In contrast, marital children may pursue claims of support at any time.



This Court has long recognized that non-marital children -- no less than marital -- are entitled to constitutional protection. "Why should the illegitimate child," this Court asked twenty years ago, "be denied correlative rights which other citizens enjoy?" Levy v. Louisiana, 391 U.S. 68, 71 (1968). The Court has thus condemned disabilities and burdens imposed on non-marital children, characterizing them as

> contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing. Obviously no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent.

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1971). Based on this principle, the Court has invalidated, on equal protection grounds, state laws that limit

to one and two years the period in which a non-marital child may establish paternity and obtain support from the biological father. Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982).

The Pennsylvania statute at issue in this case caused petitioner's child to lose continuing rights to support from her biological father. Because the statute lacks rational basis and promotes no valid state purpose, it cannot pass constitutional muster.

The statute violates procedural due process in three respects. First, the statute impermissibly allows a third-party to waive the non-marital child's right to support. The right to support, of course, belongs to the child, not the mother or guardian. It is a right which,



under Pennsylvania law, continues throughout the child's minority. This Court has recognized that the non-marital child's interest in paternal support may be at odds with other interests of the mother. Due process requires, therefore, that the child have an independent right to seek support that the mother might otherwise abandon. Because the Pennsylvania statute allows a paternity action to be brought only by the mother or guardian, it creates the very "insurmountable barrier" that this Court has condemned in related contexts. See Trimble v. Gordon, 430 U.S. 762, 770 (1977).

In equal measure, the statute impermissibly deprives the non-marital child of a forum in which to enforce his or her continuing right to support from the biological father. Because the right to support

continues during the period of minority, the loss to the child is significant and grievous.

The statute also violates procedural due process by extinguishing the non-marital child's continuing right to support before that right even accrues. As we have seen, the right to support continues throughout the period of minority. In many instances, therefore, the right to support will not -- and cannot -- accrue until after the limitations period has lapsed.

The statute also violates substantive due process because it creates an arbitrary bar that unfairly punishes an innocent child for the actions of his or her parents. Given the state's compelling interest in the welfare of children and the absence of any valid countervailing



interest, no rational basis exists for limiting a non-marital child's right to seek support. Any purported interest in preventing stale or fraudulent claims is undermined by the fact that the state imposes no comparable limitation on paternity actions in other contexts. Thus, for example, the Commonwealth imposes no limitation on the period in which paternity may be established in order to inherit from the biological father. Indeed, the statute itself permits a support action to be brought at any time during the period of minority if the putative father has contributed voluntarily to the child's support within two years of the filing of the suit. In any event, administrative convenience cannot justify penalizing a child for actions that he or she cannot control, given the important societal interest in

protecting children, reducing welfare rolls and ensuring justice.

Finally, the statute violates equal protection because it imposes a severe limit on the period in which actions for support may be brought on behalf of non-marital children, but no such limit on marital children. Nor does the period of limitations substantially relate to any valid state interest. While proof of paternity has been a traditional concern, the accuracy of current blood testing procedures forecloses any legitimate state interest in the avoidance of fraud or abuse.

Thus, Pennsylvania's six-year statute of limitations to determine paternity of non-marital children for purposes of support is constitutionally deficient under both the Due Process and the Equal



Protection Clauses of the Fourteenth Amendment.

## ARGUMENT

### I. Pennsylvania's Six-Year Statute Of Limitations Violates A Non-Marital Child's Right To Procedural Due Process

#### A. Introduction

During the past few decades, this Court, as well as appellate courts nationwide, has recognized the rights of children to constitutional protection.

> A child, merely on account of his minority, is not beyond the protection of the Constitution ... . "[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

Bellotti v. Baird, 443 U.S. 622, 633 (1979) (citations omitted). It is thus well-settled that "[m]inors ... are protected by the Constitution and possess constitutional rights." Planned Parenthood of Central

Missouri v. Danforth, 428 U.S. 52, 74 (1976).

At the same time, this Court has elaborated the rights of family members and the respective duties and obligations between parent and child. Essential to this development is the view that children are not merely the property of their parents but rather have claims and rights that may be asserted independent of or against the mother or father. See, e.g., Gomez v. Perez, 409 U.S. 535 (1973).

That the state may not deprive a child of property without affording due process of law is thus beyond dispute. Goss v. Lopez, 419 U.S. 565, 578-79 (1975); see also In re Gault, 387 U.S. 1, 27-28 (1967) (right to due process in juvenile delinquency proceedings); accord DeSantis v. Yaw, 290 Pa. Super. 535, 434 A.2d 1273



(1981); Kaur v. Singh Chawla, 11 Wash. App. 362, 522 P.2d 1198 (1974).

Non-marital children, no less than marital, are entitled to the guarantees of due process and equal protection. Indeed, the historical stigma attached to non-marital children has led this Court to show "special concern" on their behalf, and to subject disabilities visited on children born out-of-wedlock to heightened scrutiny. Pickett v. Brown, 462 U.S. 1, 7 (1983); see also Trimble v. Gordon, 430 U.S. at 762; Gomez v. Perez, supra, 409 U.S. at 535.

In this case, the Commonwealth of Pennsylvania completely and permanently foreclosed Tiffany Clark, petitioner's non-marital daughter, from asserting her legal right to support from her biological father. As a result of the application of

a six-year statute of limitations for paternity actions, the child had no opportunity to enforce her right to receive support.[2] The statute permits an action of paternity to be brought only "by a person having custody of the minor" or by a "public body or public or private agency having any interest in the care, maintenance or assistance" of the child.[3] 42 Pa. Cons. Stat. Ann. § 6704(b).[4] Here

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2/ The challenged statute, 42 Pa. Cons. Stat. Ann. § 6794(c), has since been repealed and replaced with an 18-year statute of limitations. 23 Pa. Cons. Stat. Ann. § 4343(b).

3/ Proof of paternity is a prerequisite to the successful prosecution of a support action when paternity is contested. Clark v. Jeter, 358 Pa. Super. 550, 518 A.2d 276, 279 (1986).

4/ While the Superior Court in the case below cited § 6704(b) as establishing the procedure for bringing a support action, the substance of § 6704(b) was incorporated in Pennsylvania Rule of Civil Procedure 1910.3 in 1981, at which time § 6704(b) was suspended. The Explanatory Note to Rule 1910.3 provides that the rule simply continues in place the practice which had existed

(continued...)



the child's mother -- due to a combination of factors, including physical abuse by the biological father and misinformation received from the Pennsylvania welfare department -- unwittingly allowed the limitations period to lapse. As a result, without any hearing or any forum in which to assert her claims, the daughter lost all rights to paternal support for the rest of her formative years.

Under the Due Process Clause of the Fourteenth Amendment to the Constitution, states must provide each individual "that process which, in light of the values of a free society, can be characterized as due." Boddie v. Connecticut, 401 U.S. 371, 380 (1971). At a minimum,

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4/ (...continued)
under the statute.

> absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Id. at 377. This opportunity must be "granted at a meaningful time and in a meaningful manner." Id. at 378 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Because the challenged statute -- since repealed -- compelled a non-marital child such as Tiffany Clark to settle claims to support without affording any meaningful opportunity to be heard, it cannot survive scrutiny under basic principles of due process.

### B. Under Pennsylvania Law, A Non-Marital Child Has A Property Right To Parental Support Throughout The Period Of Minority

Whether Pennsylvania's six-year statute of limitations violates the requirements of due process requires a



two-part analysis. First, petitioner must show that the government action affected a cognizable property or liberty interest established by state law. Board of Regents v. Roth, 408 U.S. 564 (1972). "To have a property interest ... a person clearly must have more than a unilateral expectation of it, they must, instead, have a legitimate claim of entitlement to it." Id. at 566.

Under Pennsylvania law, a child -- whether marital or non-marital -- has a right to parental support throughout the period of minority. The Pennsylvania courts have consistently recognized that "it is beyond question that every parent has a duty to support his or her minor children," Costello v. Lenoir, 462 Pa. 36, 337 A.2d 866, 867-868 & n.1 (1975); Conway v. Dana, 456 Pa. 536, 538, 318 A.2d 324, 325 (1974).

A parent's fundamental obligation to support his or her child has been characterized by the Pennsylvania courts as "deeply rooted in our law" and "well nigh absolute" in our society. Commonwealth, Dep't of Public Welfare ex rel. Hager v. Woolf, 276 Pa. Super. 433, 437, 419 A.2d 535, 537 (1980)(quoting Commonwealth ex rel. Kaplan v. Kaplan, 236 Pa. Super. 26, 344 A.2d 578 (1975)); Commonwealth ex rel. Snively v. Snively, 206 Pa. Super. 278, 212 A. 2d 905 (1965).[5/] A non-marital child has a right to support from his or her parents that is equivalent to that of a marital child. See, e.g., Commonwealth v. Staub, 461 Pa. 486, 491, 337 A.2d 258, 260 (1975); Commonwealth v. Rebovich, 267 Pa.

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5/ Pennsylvania also imposes a statutory obligation on parents to support their children. 62 Pa. Stat. Ann. § 1973.



Super. 254, 258, 406 A.2d 791, 793 (1979).

As this Court has explained:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. at 577. Pennsylvania's civil support statute -- which contains the six-year statute of limitations at issue in this case -- provides a procedure for enforcing the child's substantive right to parental support, Jennis v. Stillman, 306 Pa. Super. 431, 452 A.2d 801, 802 (1982), which is a property right under Pennsylvania law. See, e.g., DeSantis v. Yaw, 290 Pa. Super. at 540, 434 A.2d at 1275-76.

A non-marital child such as Tiffany Clark thus has an identifiable and "legitimate claim of entitlement," Board of Regents v. Roth, 408 U.S. at 577, to support from her biological father, a right which continues throughout the period of minority and, in certain circumstances, even beyond. See, e.g., Commonwealth ex rel. Leider v. Leider, 335 Pa. Super. 249, 484 A.2d 117 (1984). This property interest is significant and has enormous impact on a child's quality of life during the formative years. The Commonwealth of Pennsylvania may not eliminate or limit this important property interest without affording the non-marital child due process of law.



### C. The Six-year Statute Of Limitations Impermissibly Forecloses A Non-Marital Child's Right To Support Without Providing A Meaningful Opportunity To Be Heard

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). As we have seen, Pennsylvania failed to provide petitioner's infant with any independent opportunity to enforce her continuing right to support. Instead, the child was made to depend on the legal actions of her custodial representative during a truncated six-year period. The operation of the statute allowed a third-party to waive irrevocably the non-marital child's right to support.

In Mathews v. Eldridge, 424 U.S. 319 (1976), the Court identified three factors to be considered in determining "what process is due":

> First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. These factors will be addressed seriatim.

1. The Statute Deprived The Non-Marital Child Of An Important Property Right To Support

In this case, the private interest most grievously affected is the non-marital child's right to receive support from her biological father. The child's interest is significant and its loss may be determinative of the basic quality not only of her formative years, but of her future as well. Without paternal support, the child



may be reduced to economic marginality, become dependent on public assistance, and be foreclosed from a broad range of educational and cultural opportunities.

2. The Statute Creates A Significant Risk Of Erroneous Deprivation

Notwithstanding the importance of the child's interest, the statute creates a substantial risk of erroneous deprivation of this significant entitlement. The inadequacy of its procedures goes far beyond the mere "risk" of "erroneous" deprivation; it guarantees an absolute deprivation of ongoing support unless the mother or other custodian takes action on the child's behalf during a limited six-year period.

a. The Statute Allows A Third Party To Waive Irrevocably The Non-Marital Child's Rights To Support

By denying the non-marital child an independent cause of action, the statute allows a third-party to waive irrevocably

significant property rights to support from the father. The restrictions imposed on the custodial representative heighten the risk of erroneous deprivation.

The six-year period allowed under the statute could not reasonably have been expected to afford the mother sufficient time to assert the child's rights on its behalf. The physical, financial and economic complications attendant upon a non-marital birth are known to continue and perhaps even increase in magnitude during the child's early years. This Court has explained that "practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of an illegitimate child." Pickett v. Brown, 462 U.S. at 11. These obstacles become more -- not less -- formidable with each passing year: "The mother may



experience financial difficulties caused not only by the child's birth but also by the loss of income attributable to the need to care for the child." Id. at 12.

Nor do the emotional complications of a non-marital birth necessarily subside during a brief six-year period. The mother may believe that formal steps to adjudicate paternity will precipitate retribution by the father or cause voluntary support or visitation to cease. In the case here, the mother suffered abuse at the hands of the biological father. When she finally did elect to adjudicate paternity, she received inaccurate information from the Pennsylvania welfare department. Unsophisticated and misinformed, she discovered too

late that the limitations period had lapsed.6/

Thus, a range of factors may disable a mother or guardian from bringing an action to adjudicate paternity in the first six years of the child's birth. Ignorance of the statutory period, fear of the child's father, lack of financial need during the relevant time period, or a continuing emotional tie to the father may cause inaction and result in an irrevocable waiver of the child's right to support.

Moreover, the interests of the mother during this period may not in fact be "congruent" with those of the child. See generally Mills v. Habluetzel, 456 U.S. at

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6/ The statute also provides that a support action may be brought within two years of any contribution by the father to the child's support or of any written acknowledgement of paternity. The two-year period, however, is likewise not realistic given the practical obstacles that the mother must face.



105 & n.4 (O'Connor, J., concurring). A mother may refrain from initiating legal proceedings in order to encourage a continuing emotional relationship with the father or to avoid community or family disapproval. Ibid. In addition, the mother may be able to support the child initially. After the expiration of the statute of limitations, however, she may lose her job, exhaust savings, or become disabled, at which time the child's need for support from the biological father could become critical. See also Spada v. Pauley, 149 Mich. App. 196, 385 N.W.2d 746 (1986) (mother's interests may not sufficiently coincide with those of child to protect the child's rights).

By failing to provide the child any independent right of action separate from

the mother, the statute creates a significant risk of erroneous deprivation.

b. The Statute Failed To Provide The Non-Marital Child With A Forum To Enforce His Or Her Continuing Right To Support

This risk is compounded by the fact that Pennsylvania provides no forum in which the non-marital child can enforce his or her ongoing right to support. As we have seen, under Pennsylvania law, a parent's obligation to support a child and the child's concomitant right to receive support is continuous throughout the period of the child's minority and, under some circumstances, even beyond. See Commonwealth ex rel. Leider v. Leider, 335 Pa. Super. at 249, 484 A.2d at 117; Jennis v. Stillman, 306 Pa. Super. at 431, 452 A.2d at 801 (1982); see also State of Florida, Department of Health and



Rehabilitative Services ex rel. Gillespie v. West, 378 S.2d 1220, 1227 (Fla. 1979) (child's right to support is "a continuing right renewing itself until the child becomes eighteen," which "has never become dormant"). The due process to which non-marital children are entitled must include some opportunity in some forum to enforce this continuing right to support.

c. The Statute Extinguished The Non-Marital Child's Rights To Support Before Those Rights Accrued

The statute further heightens the risk of erroneous deprivation by extinguishing the non-marital child's right to support before that right has even accrued. The typical statute of limitations bars the assertion of a claim after the lapse of a period of time defined subsequent to the accrual of a right. As we have seen, the parent's obligation to provide and the child's right to receive support continues

throughout the period of minority. See also State of Florida ex rel. Gillespie v. West, 378 So.2d 1220, 1227 (Fla. 1979)(child's right to support is "a continuing right renewing itself until the child becomes eighteen," which can "never become dormant"). Pennsylvania's six-year statute, however, bars the assertion of the child's right to support after the age of six prior to accrual of that right -- thus completely foreclosing the child's "opportunity to be heard."

No statute of limitations can begin to run, of course, until a cause of action accrues. Sicola v. First National Bank of Altoona, 404 Pa. 18, 170 A.2d 584 (1961). Under settled Pennsylvania law, a cause of action accrues when the injury is actually suffered, not when the cause which ultimately produces the injury is first set in



motion. Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949).7/

Far from preventing the institution of "stale" claims, therefore, the six-year statute destroys a non-marital child's right to seek support before those claims can even accrue. Cf. County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980)(since child has right to support throughout its minority, claims for support can never be stale).8/

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7/ Moreover, under longstanding principles of Pennsylvania law, a statute of limitations will not bar an action for a continuing wrong. See Kane Gas Light & Heating Co. v. Pennzoil Co., 95 F.R.D. 531, 533-34 (W.D. Pa. 1982). Cf. Stuebig v. Hammel, 446 F.Supp. 31, 35 (M.D. Pa. 1977); Anaconda Company v. Metric Tool & Die Co., 485 F.Supp. 410, 426 (E.D.Pa. 1980).

8/ While the legislature may constitutionally abolish a right of action without substituting another means of redress, see e.g., Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978), that principle is inapplicable under the present circumstances, since the legislature clearly may not abolish the support

(continued...)

d. The Importance Of The Child's Interest And The Risk Of Deprivation Outweigh Any Administrative Burden That The State Might Claim

Additional or substitute procedural safeguards would significantly reduce the risk of an erroneous deprivation of the child's rights. The need for such procedures is also grounded upon the "fundamental fairness" required by the Due Process Clause, see Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1981). The importance of the child's ongoing interest in paternal support and the substantial, predictable risk of erroneous deprivation far outweigh any fiscal or administrative burden that the state might claim. Indeed, Pennsylvania has since

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8/ (...continued)
rights of illegitimate children while maintaining those rights for legitimate children. Gomez v. Perez, 409 U.S. at 535.



amended its paternity law to provide an eighteen-year statute of limitations. 23 Pa. Cons. Stat. Ann. § 4343(b). Thus, the legislature has already indicated that the state will suffer no untoward "fiscal and administrative burdens" by keeping its courts open to adjudicate claims by non-marital children for support. Moreover, the Commonwealth allows paternity actions to be brought by children of any age pursuant to inheritance proceedings, 20 Pa. Cons. Stat. Ann. § 2107(c)(3), and allows the tolling of other causes of action during the child's minority, 42 Pa. Cons. Stat. Ann. § 5533.9/

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9/ In DeSantis v. Yaw, 290 Pa. Super. at 535, 434 A.2d at 1273, the Pennsylvania Superior Court, with great reluctance, upheld a statute of limitations barring a minor's tort suit. Since DeSantis was decided, the Pennsylvania tolling statute, 42 Pa. Cons. Stat. Ann. § 5533, has been revised to provide that "if an individual entitled to bring a civil action is an unemancipated minor at the time
(continued...)

Given the Commonwealth's compelling interest in the welfare of children, the doing of justice, and the reduction of state welfare rolls, it can have no legitimate countervailing interest in depriving non-marital children of a forum in which to pursue claims for support to which they are entitled. Absent additional procedural safeguards, however, the constitutional requirement of a "meaningful opportunity to be heard ... at a meaningful time and in a meaningful manner" is reduced to a mere platitude. See Boddie v. Connecticut, 401 U.S. at 377-378.

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9/ (...continued)
the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced." Since under the Pennsylvania support statute, a non-marital child is not "entitled to bring a civil action," tolling does not occur during the period of minority.



Under similar circumstances, state appellate courts have consistently invalidated statutes of limitations for paternity actions where the child does not have a right of action independent from that of the custodial representative. These statutes also worked to deprive the child of a forum in which to enforce ongoing claims to support, and to extinguish claims to support before they can occur.

In Kaur v. Singh Chawla, 11 Wash. App. at 362, 522 P.2d at 1198, for example, the Washington Court of Appeals, considering a two-year statute of limitations, held that a non-marital child's right to support from the biological father could be judicially enforced under common law even if the legislature had not created a statutory cause of action on behalf of the child:

> [T]he duty to support an illegitimate child does not expire at the end of the second year of a child's life simply because his mother has failed to bring and action to establish the identity of his father.

Id. at 336, 522 P.2d at 1200 (quoting State v. Bowen), 80 Wash.2d 808, 811, 498 P.2d 877, 879 (1972)).10/ Emphasizing that "the law does not permit one to forfeit another's rights," the court stated:

> [t]he right of an illegitimate child to assert a claim for parental support is too fundamental to permit its forfeiture by its mother's failure to timely institute a filiation proceeding.

Kaur, 522 P.2d at 1200.

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10/ In State v. Bowen, 80 Wash.2d 808, 498 P.2d 877 (1972), the Supreme Court of Washington examined an unmarried mother's agreement to waive future claims for child support in return for a lump-sum payment from the putative father. The Court explained that any attempted waiver of the child's support rights would be deemed ineffective unless the consideration paid was at least equal to that which "the law would require in a filiation proceeding." Id. at 881.



Concluding that Washington's two-year statute of limitations would violate due process if the statutory filiation procedure provided the exclusive remedy to adjudicate paternity, the court construed the law to permit the child to bring an independent common law action. Id. at 1201.

In Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974), the Supreme Court of Kansas likewise considered a state filiation procedure that on its face allowed only the mother to initiate an action for support. As in Pennsylvania, the Kansas statutory framework provides "machinery for the enforcement of a duty already existing rather than ... creating a new obligation." 215 Kan. at 454, 524 P.2d at 746 (quoting Doughty v. Engler, 112 Kan. 583, 211 P. 619 (1923)). Cf. Jennis v.

Stillman, 306 Pa. Super. at 431, 452 A.2d at 801.

In Huss, the mother attempted to compromise or otherwise settle the child's right to support. The court invalidated the agreement on the ground that the legislature, in authorizing the mother to bring a paternity action on behalf of the child, did not intend to relieve the biological father of his obligation to support. Construing the statute to bar only the mother's cause of action after the limitations period had lapsed -- but not the child's common law action -- the court upheld the statute. 524 P.2d at 747.

In contrast, the statute here has been construed as providing an exclusive procedure for the determination of paternity. Clark v. Jeter, 358 Pa. Super. at 560, 518 A.2d at 281. Since the statute permits a



third-party to waive the non-marital child's continuing right to support, it unconstitutionally erects an impenetrable barrier which deprives the child of due process. See Doak v. Milbauer, 216 Neb. 331, 343, N.W. 2d 751 (1984)(statute of limitations held constitutional where construed to preclude only mother's cause of action); Stringer v. Dudoich, 92 N.M. 98, 583 P.2d 462 (1978)(statute held unconstitutional to extent it limited right of non-marital child to seek paternity determination and support); Ortega v. Portales, 134 Colo. 537, 307 P.2d 193 (1957)(unconstitutional to deprive child of right to support by failure of third-party to act within specified period after birth).11/

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11/ Additionally, prior to this Court's decision in Mills v. Habluetzel, 456 U.S. 91 (1982), the Texas Court of Civil Appeals held unconstitutional a statute that effectively allowed a mother to (continued...)

Thus, balancing the factors set forth by this Court, Pennsylvania's six-year statute of limitations does not comport with the procedural requirements of due process.12/

II. The Pennsylvania Six-Year Statute Of Limitations Lacks Any Rational Basis And Violates Substantive Due Process

Pennsylvania's six-year statute of limitations also violates substantive due process. As this Court has stated:

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11/ (...continued)
waive a non-marital child's right to support. In re Miller, 605 S.W.2d 332 (Tex. Civ. App. 1980), aff'd sub nom. In re J.A.M., 631 S.W.2d 730 (Tex. 1982).

12/ Even if Pennsylvania were to establish a procedure providing a presumptively suitable representative of a child with reasonable notice -- including notice that the failure to establish paternity within the statutory time period would forever bar the child's right to bring an action for support -- an opportunity to be heard, the procedure would still be constitutionally suspect if it continued to permit a third-party to waive the child's rights to seek support or if it foreclosed those rights before they accrued.



> It is the child's interest that are at stake. The father's duty of support is owed to the child, not to the mother ... . Moreover, it is the child who has an interest in establishing a relationship to his father ... . Restrictive periods of limitation, therefore, necessarily affect the interest of the child and their validity must be assessed in that light.

Pickett v. Brown, 462 U.S. at 16 n.15. The Pennsylvania Supreme Court has likewise recognized:

> The primary interest of the State is to secure support for the child born out of wedlock and to prevent it from becoming a public charge.

Commonwealth v. Staub, 461 Pa. at 491, 337 A.2d at 260. See also Conway v. Dana, 456 Pa. at 540, 318 A.2d at 326 (primary purpose of child support is best interest and welfare of the child); Payne v. Prince George's County Department of Social Services, 67 Md. App. 327, 507 A.2d 641, 646 (1986) (right to support is fundamentally the right of the child).

The Pennsylvania statute, however, ignores the child's interest by foreclosing all possibility of paternal support unless a third-party institutes an action to adjudicate the child's paternity before the child reaches the age of six.

This Court has repeatedly rejected classifications that deny benefits to a needy child based on the behavior of the child's parent or some other third-party. In a broad range of contexts, the Court has recognized the impermissibility of visiting the sins of a parent upon a child. E.g., U.S. Constitution Art. III, § 3, ¶2 (prohibiting corruption of blood as punishment for treason); Plyler v. Doe, 457 U.S. at 202 (prohibiting denial of education to child of undocumented alien resident in Texas); Weber v. Aetna Casualty & Surety



Co., 406 U.S. at 164 (prohibiting discrimination against non-marital child).

Non-marital children such as Tiffany Clark can "affect neither their parents' conduct nor their own status." Trimble v. Gordon, 430 U.S. at 770. It is "difficult to conceive of a rational justification for penalizing" non-marital children who require support simply because paternity is not proved during the first six years of their lives. See Plyler v. Doe, 457 U.S. 202, 220 (1982). Vague assertions of fiscal burden cannot justify wholesale exclusion of the child's claim to support. Indeed, as we have seen, the state has since amended its statute to allow an eighteen-year period of limitations. In virtually all other instances, Pennsylvania tolls the statute of limitations throughout the period of minority. 42 Pa. Cons.

Stat. Ann. § 5533(b). In addition, the Commonwealth imposes no limitation on the right to determine paternity in other contexts, even when significant financial and emotional interests are at stake, such as inheritance. Any purported state interest in avoiding stale claims must thus be seen as de minimis.

The support of minor children must be seen as an essential concern for any society that values family rights, personal responsibility and the promotion of independence and self-sufficiency among its citizens. In light of the absence of any valid countervailing interest, there is simply no rational basis for the imposition of Pennsylvania's six-year statute of limitations upon the rights of non-marital children to support.



## III. Pennsylvania's Since Repealed Six-Year Statute Of Limitations Violates The Equal Protection Clause Of The Fourteenth Amendment

### A. Introduction

This Court has traditionally subjected "statutory classifications based on illegitimacy to a heightened level of scrutiny." Pickett v. Brown, 462 U.S. at 7. "[R]estrictions on support suits by illegitimate children 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.'" Id. at 8, quoting Mills v. Habluetzel, 456 U.S. at 99.

To pass this exacting level of scrutiny, the classification must satisfy two related criteria. First, the time period permitted by the state to establish paternity (and hence obtain support) must be sufficiently long to allow claimants a reasonable opportunity to file suit.

Second, the period of limitations must be substantially related to the state's asserted interest in preventing the litigation of stale or fraudulent claims.

Amici discuss below the second of these two equal-protection criteria articulated by this Court: Whether the six-year statute of limitations is substantially related to a valid state interest in preventing stale or fraudulent claims. Specifically, we focus on recent developments in blood testing technology that seriously undermine the state's traditional interest in proof of paternity and the avoidance of spurious claims.

In Pickett and Mills, this Court invalidated statutes of limitations in paternity actions that were found not to relate substantially to any valid state interest in preventing stale or fraudulent



claims. Pickett v. Brown 462 U.S. at 1; Mills v. Habluetzel, 456 U.S. at 91. Both decisions analyzed the traditional problems of proof in paternity actions in light of scientific developments as of 1976 in the field of blood testing. The Court relied on a scientific report, published in 1976, "'that blood tests currently can achieve a 'mean probability of exclusion [of] at least ... 90 percent ... .'" Pickett v. Brown, 462 U.S. at 17, quoting Miale, Jennings, Reggberg, Sell, & Krause, Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family L.Q. 247 (1976).

In Mills, the Court rejected the argument that recent advances in blood testing completely negated the state's interest in avoiding the prosecution of stale or fraudulent claims. 456 U.S. at 98

& n.4. Pickett, however, acknowledged that

> [i]t is not inconsistent with this view ... to suggest that advances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims. This is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest.

462 U.S. at 18-19.

Since Mills and Pickett -- and the 1976 report on which the Court relied -- developments have occurred in the field of blood testing that significantly reduce "'the possibility that a defendant will be falsely accused of being the illegitimate child's father.'" Pickett v. Brown, 462 U.S. at 17, Mills v. Habluetzel, 456 U.S. at 100 (O'Connor, J. concurring).



Scientific developments have also substantially improved, to a high degree of certainty, the capacity for affirmative identification of a non-marital child's biological father. Recent technology has thus so attenuated the state's interest in precluding stale and fraudulent claims that there is no longer any rational basis for eliminating a child's ability to enjoy his or her continuing rights to support.13/

### B. Advances In Blood Testing and Its Increased Acceptance Results In Paternity Actions

At the beginning of this century, Karl Landsteiner discovered that people could be classified by three blood groups -- A, B,

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13/ As the Supreme Court of Appeals of West Virginia noted in State of West Virginia ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (1981), "statutes which are entirely rational at the time they are enacted by the legislature may, by the passage of decades, become irrational when applied to an entirely changed social structure." Id. at 915.

and 0. Over the next several decades, scientific research led to the introduction of number of other blood-grouping tests.14/

These blood tests were able to provide "exclusionary" evidence probative of non-paternity; that is, a negative test result eliminated an accused male from the pool of putative fathers. By 1975, traditional blood testing techniques could establish a probability of exclusion of over 90 percent. See generally Shaw, Paternity Determination: 1921 to 1983 and Beyond, 250 J. A.M.A. 2536 (Nov. 11, 1983)(citing Shaw and Kass, Illegitimacy, Child Support, and Paternity Testing, 13 Houston L. Rev. 41 (1975)).

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14/ Six grouping tests predominated: the ABO, Rh, MNSs, Kell, Duffy and Kidd systems. Kolko, Admissibility of HLA Tests to Determine Paternity, 9 Fam. L. Rep. (BNA) 4009, 4010 (Feb. 15, 1983).



Over the last two decades, developments in the sophisticated human leukocyte antigen ("HLA") system have significantly increased the possibility of certainty in blood testing for paternity. Terasaki, Resolution by HLA Testing of 1,000 Paternity Cases Not Excluded by ABO Testing, 16 J. Fam. L. 543 (1977-78). "The scientific fact is that blood typing in its various forms now is capable of establishing nonpaternity in the vast majority of cases (95-99%) in which the man named by the mother actually is not the father." Broun and Krause, "Paternity Blood Tests and the Courts," in Inclusion Probabilities and Parentage Testing 171 (R. Walker Ed. 1983).

Initially, courts were reluctant to allow a jury to consider blood test results in disputed paternity cases. Before the

HLA test was developed, blood test results were admissible only to exclude an alleged father from the pool of putative fathers. In 1950, Justice Brennan, then a judge of the New Jersey Superior Court, summarized the legal status of blood typing:

> The value of blood tests as a wholesome aid in the quest for truth in the administration of justice ... cannot be gainsaid in this day. The reliability as an indicator of the truth has been fully established. The substantial weight of medical and legal authority attests their accuracy, not to prove paternity, and not always to disprove it, but "they can disprove it conclusively in a great many cases provided that [the tests] are administered by specially qualified experts."

Cortese v. Cortese, 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950)(citations omitted). Two years later, in 1952, the American Medical Association endorsed the use of blood tests by courts in paternity cases. Davidsohn, Levine, and Weiner,



Medicolegal Applications of Blood Grouping Tests, 149 J. A.M.A. 699 (1952).

In a growing number of states, evidence of a properly conducted blood grouping test which excludes paternity is conclusive on the issue. See Broun and Krause, "Paternity Blood Tests and the Courts," at 174; see e.g., Tex. Fam. Code Ann. § 13.05(a) (requiring dismissal with prejudice of a paternity action predicated on blood test results excluding the respondent as the natural father of the child). In addition to exclusionary evidence proving that the respondent is not the natural father, several states now also make admissible blood tests that are understood to show affirmatively the probability or likelihood of paternity. A number of states have specific statutory provisions permitting the introduction of

"probability" evidence in paternity cases. See e.g., Cal. Evid. Code § 892, 895; Colo. Rev. Stat. § 13-25-126; Ga. Code Ann. 19-7-45, 19-7-46; Idaho Code § 7-1115; Iowa Code Ann. § 675.41; Mich. Comp. Laws Ann. § 722.716; Nev. Rev. Stat. § 126.131; N.Y. Fam. Ct. Act §§ 418 and 532; N.C. Gen. Stat. § 49-7; Wis. Stat. Ann. §§ 767.47, 885.23.

North Carolina, for example, was one of the first states to acknowledge that advances in blood testing techniques had dramatically altered traditional concerns about proof of paternity in contested actions. In 1979, the state legislature found:

> [T]he medical state of the art was formerly such that blood tests made in paternity cases could only be used to exclude a putative parent from the class of persons potentially capable of being the biological parent; however, a recent breakthrough in medical science now enables extended factor blood tests to show the inclusionary probability that a putative parent is the biological parent of a child.



Brown and Krause, "Paternity Blood Tests and the Courts," at 177-178 (quoting General Assembly of North Carolina, Session 1979, ch. 576, Senate Bill 230). Upon motion, the North Carolina court may order the parties in "any civil action in which the question of parentage arises" to submit to

> any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged-parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist,

duly qualified geneticist, or other qualified person ... .

Ibid. (emphasis added).

Pennsylvania has adopted the Uniform Act on Blood Tests to Determine Paternity and mandates the use of court-ordered HLA and related blood tests to establish paternity. 42 Pa. Cons. Stat. Ann. § 6136. ("[i]f the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests are that the alleged father is not the father of the child, the question of paternity, parentage or identity of a child shall be resolved accordingly").

Pennsylvania thus permits the introduction of blood test results to exclude a respondent as a possible father, which can serve as conclusive evidence of non-paternity. In addition, inclusionary evidence is also allowed. In Turek v.



Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983), for example, the Pennsylvania Superior Court held that an HLA test indicating a probability of parentage was admissible as evidence of paternity.

C. Recent Developments Now Enable the Identification of Biological Fathers

Recent scientific developments have refined still further the state's ability to identify the biological father of a non-marital child. The discovery of "DNA sequence polymorphisms" have resulted in tests that make paternity identification nearly certain except where the alleged father has an identical twin. Shaw, Paternity Determination: 1921 to 1983 and Beyond, 250 J. A.M.A. 2536 (1983). These tests rely on the fact that each person has different sequences of DNA, the substance which makes up chromosomes and carries the

genetic code determining personal characteristics such as eye color and hair texture. Given these individual "DNA sequences," it is possible through DNA testing to identify a particular male as a child's biological father to the virtual exclusion of all others. Ibid.

One such test, involving "DNA fingerprinting," was developed in 1985 by geneticist Alec Jeffreys and his colleagues at the University of Leicester in England. The probability that the genetic fingerprints of two individuals will be identical is calculated to be of the order of $3 \times 10^{-11}$, depending on the extensiveness of the analysis. Dodd, DNA Fingerprinting in Matters of Family and Crime, 26 Med. Sci. L. 5 (1986). In England, the courts have used DNA fingerprinting to establish maternity for pur-



poses of granting a boy entry into the country. Id. at 6. Genetic fingerprinting has also been used in rape cases in both England and the United States. Maugh, Genetic Fingerprinting Joins Crime War, Los Angeles Times, Jan. 7, 1988, at 3, col. 1.15/

Advances in the area of DNA testing allow accurate identification of parentage. These advances, coupled with the increased accuracy of standard blood testing procedures, render the possibility of successful prosecution of stale or fraudulent paternity claims extremely remote.

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15/ On February 5, 1988, a Florida jury convicted a man of rape on the basis of genetic analysis of the DNA fingerprint in his blood. State of Florida v. Tommy Lee Andrews, CR-87, No. 1400, Ninth Judicial Circuit.

D. Pennsylvania's Six-Year Statute Of Limitations Can No Longer Be Justified As Substantially Related To A Valid State Interest In Preventing Stale Or Fraudulent Claims

In Astemborski v. Susmarski, 502 Pa. 409, 466 A.2d 1018 (1983), the Pennsylvania Supreme Court upheld the constitutionality of the six-year statute of limitations at issue in this case.

> Insofar as the requirement set forth in Mills that periods of limitation bear a substantial relation to the state's interest in avoiding litigation of stale or fraudulent claims, the Court in Pickett rejected, as it had in Mills, the argument that recent advances in blood and genetic testing have provided scientific means so highly probative in determining paternity that their existence entirely negates the state interest in preventing the assertion of stale or fraudulent claims.

Id. at 1021. The court held that the state's interest in preventing stale or fraudulent claims justified the six-year



statute of limitations, finding that the six-year period was not so truncated as to be "illusory."

The Pennsylvania Supreme Court's analysis, however is premised upon scientific evidence that is now more than a decade out-of-date. As we have seen, advances in the field of blood testing and DNA testing since 1976 have dramatically increased the probability of establishing fatherhood, and compel a rebalancing of the two factors identified by this Court in Mills.

The increased ability to determine the identity of the biological father has attenuated the state's interest in preventing stale or fraudulent claims.16/

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16/ The continued significance of Pennsylvania's interest in preventing stale or fraudulent claims in these circumstances is, moreover, questionable in light of Pennsylvania's minority tolling (continued...)

That interest can no longer rationally be claimed to outweigh a child's fundamental right to support from his or her biological parents or the public's interest in reducing the state's public assistance burden.17/

> Relatively short statutes of limitations were enacted in the past in order to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have became faulty. Recent progress in developing highly specific tests for genetic markers now permits the exclusion of over 99 percent of those wrongly accused of paternity regardless of the age of that child.

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16/ (...continued)
statute, 42 Pa. Cons. Stat. Ann. § 5533(b), and inheritance statute, 20 Pa. Cons. Stat. Ann. § 2107(c)(3), which permits paternity actions after the parent has died.

17/ Moreover, the plaintiff in a paternity action still bears the burden of proof by a preponderance of the evidence. 42 Pa. Cons. Stat. Ann. §6704(g).



H.R. Rep. No. 527, 98th Cong., 1st Sess. at 38 [Child Support and Enforcement Amendments of 1984, Pub.L. No. 98-378, 98 Stat. 1305 (1984)].

Courts may indeed be "powerless to prevent the social opprobrium suffered by [non-marital] children," Weber v. Aetna Casualty & Surety Co., 406 U.S. at 176, but the Equal Protection Clause requires the invalidation of "discriminatory laws relating to status of birth where -- as in this case -- the classification is justified by no legitimate state interest, compelling or otherwise." Ibid.

## CONCLUSION

For the foregoing reasons, amici respectfully urge that the judgment below be reversed, and that the six-year statute of limitations set forth in the now-

repealed Pennsylvania support statute, 42 Pa. Cons. Stat. Ann. § 6704(e), be declared unconstitutional.

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Dated: February 25, 1988